

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts to repeal §328.203 and §328.204; and simultaneously adopts new §328.203 and §328.204.

The repeal of §328.203 and §328.204 and new §328.203 and §328.204 are adopted *without changes* to the proposal as published in the October 23, 2020, issue of the Texas Register (45 TexReg 7534) and, therefore, will not be republished.

### **Background and Summary of the Factual Basis for the Adopted Rules**

The rulemaking adoption implements Texas Health and Safety Code (THSC), §361.425 and §361.426 to exempt certain governmental entities from compliance with recycling requirements. THSC, §361.425 and §361.426 require that governmental entities establish a recycling program, create procedures for a recycling program, and give preferences in purchasing to products made of recyclable materials if applicable criteria are met.

The rulemaking adoption will apply to governmental entities pertaining to purchasing preferences for products made of recycled materials. The adopted rules will also provide an exemption available to governmental entities, if compliance with the recycling program or purchasing preferences will create a hardship for the governmental entity.

### **Section by Section Discussion**

The commission adopts to repeal existing §328.203 and §328.204 in order to restructure and provide order and clarity to the provisions within Chapter 328, Subchapter K.

#### *§328.203, Purchasing Preference for Recycled Materials*

The commission adopts new §328.203 to require certain governmental entities to give preference to purchasing products made of recycled materials. New §328.203 includes the same language as repealed §328.204.

#### *§328.204, Exemptions*

The commission adopts new §328.204 to provide specific exemptions that are allowed under the rule as well as opportunities for an exemption request due to a hardship. New §328.204 includes the same language as repealed §328.203.

### **Final Regulatory Impact Determination**

The commission reviewed the rulemaking adoption in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking adoption is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, and that

may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. New §328.203 and §328.204 are adopted to restructure and provide order and clarity to the provisions within Subchapter K.

In addition, a regulatory impact analysis is not required because the rulemaking adoption does not meet any of the applicability criteria for requiring a regulatory analysis of a "Major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program, or; 4) adopt a rule solely under the general authority of the commission. Adopted new §328.203 and §328.204 do not exceed an express requirement of state law, federal law, or a requirement of a delegation agreement and were not developed solely under the general powers of the agency but are authorized by specific sections of the THSC that are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact

Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

### **Takings Impact Assessment**

The commission evaluated the rulemaking adoption and performed an analysis of whether the rulemaking adoption constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007, does not apply.

Under Texas Government Code, §2007.002(5), taking means: (A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

Promulgation and enforcement of the rulemaking adoption will be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rulemaking is to restructure and provide order and clarity to the provisions within Subchapter K. The rulemaking adoption does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

### **Consistency with the Coastal Management Program**

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

**Public Comment**

The commission held a public hearing on November 17, 2020. The comment period closed on November 24, 2020. No comments were received for this rulemaking.

## **SUBCHAPTER K: GOVERNMENTAL ENTITY RECYCLING AND PURCHASING OF RECYCLED MATERIALS**

### **Statutory Authority**

The adopted rules are repealed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The adopted rules are also repealed under Texas Health and Safety Code (THSC), §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste; THSC, §361.425, which provides that the commission shall adopt rules for administering governmental entity recycling programs; and THSC, §361.426, which provides that the commission shall adopt rules for administering governmental entity preferences for recycled products.

The adopted repealed rules implement TWC, §§5.102, 5.103, and 5.105 and THSC, §§361.024, 361.425, and 361.426.

### **§328.203. Exemptions.**

### **§328.204. Purchasing Preference for Recycled Materials.**

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RECYCLED MATERIALS  
§328.203, §328.204**

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The adopted new rules implement TWC, §§5.102, 5.103, and 5.105 and THSC, §§361.024, 361.425, and 361.426.



**§328.203. Purchasing Preference for Recycled Materials.**

A state agency, state court, or judicial agency not subject to Texas Government Code, Title 10, Subtitle D, and a county, municipality, school district, junior or community college, or special district shall give preference in purchasing to products made of recycled materials if the products meet applicable specifications as to quantity and quality and the average price of the product is not more than 10% greater than the price of comparable nonrecycled products. Preferences will be applied in accordance with state procurement statutes and rules.

**§328.204. Exemptions.**

(a) This subchapter does not apply to:

(1) a school district with a student enrollment of less than 10,000 students; and

(2) a municipality with a population of less than 5,000, if compliance with this subchapter would create a hardship.

(b) A governmental entity may exclude one or more recyclable materials from their program if the commission finds that:

(1) a recycling program for a recyclable material is not available through their solid waste provider; or

(2) the inclusion of a recyclable material would create a hardship.

(c) A governmental entity may request additional consideration from the commission if compliance with this subchapter would create a hardship.